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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

VLADIMIR GARCIA SOZA,

Appellant.

2 CA-CR 2007-0383

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063636

Honorable Stephen C. Villarreal, Judge

REVERSED AND REMANDED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Vladimir Soza was convicted of the first-degree murder of Lee L. On appeal, Soza argues the trial court erred by, inter alia, (1) denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P.; (2) admitting evidence of his prior incarceration; and (3) admitting evidence of a pretrial identification. Although there was sufficient evidence to support his conviction and therefore the trial court did not err when it denied his Rule 20 motion, we agree with Soza that the court erred in admitting evidence of his prior incarceration. Because we cannot say beyond a reasonable doubt that this error was harmless, we reverse the conviction and remand this matter for a new trial. We also address Soza’s argument relating to a pretrial identification because it is likely to recur on remand.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the conviction. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). Shortly after 3:00 a.m. on September 17, 2006, Lee L. and two companions left a midtown Tucson nightclub and walked to their truck, which was parked behind the club. Wearing a sleeveless white T-shirt, Soza left the same club with a companion less than a minute later. A video camera at the rear of the club recorded a man wearing a similar white shirt following Lee into the parking lot. The man pulled out a gun, called out Lee’s nickname, said “this is for Raul,” shot him, and fled. Matthew C., one of Lee’s companions, subsequently identified Soza as the shooter.

¶3 At trial, the state introduced evidence that Soza had tattoos indicating his membership in the Barrio Centro gang, and that Lee too had been a member of that gang. The state also presented evidence that a third man, Raul Maldonado, had been convicted of murder and sentenced to prison some years before as a result of testimony provided by Lee,¹ and that Soza had been released from prison two months before Lee’s murder. The jury found Soza guilty of first-degree murder and the court sentenced him to natural life in prison. This appeal followed; we have jurisdiction under A.R.S. § 13-4033(A).

Discussion

Sufficiency of the evidence

¶4 We first consider Soza’s argument that there was insufficient evidence to support his conviction, and the trial court thus erred in denying his motion for a judgment of acquittal under Rule 20. “In determining the sufficiency of the evidence, we view the evidence in the light most favorable to sustaining the verdict, and we resolve all inferences against the defendant.” *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). We will not reverse a trial court’s ruling on a Rule 20 motion unless “there is a complete absence of ‘substantial evidence’ to support the conviction.” *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). “Substantial evidence is that which reasonable

¹We can find nothing in the record to support the state’s assertion that Maldonado is also a member of Barrio Centro. On the contrary, the prosecutor in the case in which Lee had testified against Maldonado testified in this case that the case involving Maldonado “did not appear to have anything to do with gang matters.”

persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477. Furthermore, “[t]he substantial evidence required to warrant a conviction may be either circumstantial or direct,” and its probative value is not reduced simply because it is circumstantial.² *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981).

¶5 The state presented evidence that Soza had been at the club on the evening of the murder and he had been wearing a white, sleeveless T-shirt. He and Lee shook hands as Lee was leaving, and a club employee testified that less than a minute later Soza “g[ot] up and le[ft] rather quick for some reason.” The jury was shown video footage depicting the respective departures of Lee with his girlfriend and Matthew, and Soza with his companion, and, from a second camera, an individual in the rear parking lot following Lee and then running away. Although the second video showed neither the face of the shooter nor any distinctive physical characteristics, he was wearing a white T-shirt similar to the one Soza had been wearing inside the club. Matthew testified that the gunman had tattoos on his arms and that he had identified Soza before trial as the shooter when he saw a photograph of him on a “MySpace” internet web account.³ Lee’s girlfriend was unable to identify Soza from

²We note Soza’s argument that “circumstantial evidence may properly be considered as proof of a crime only when . . . it is inconsistent with every conceivable hypothesis of innocence” relies on a holding in *State v. Hernandez*, 7 Ariz. App. 200, 206, 437 P.2d 952, 958 (1968), which is no longer the law in Arizona. See *State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970); *State v. Olivas*, 119 Ariz. 22, 23, 579 P.2d 60, 61 (App. 1978).

³Matthew was first shown a photographic “line-up” featuring Soza and five other men with similar physical characteristics and was unable to identify Soza. He was then shown

a photographic “line-up.” However, she testified she had seen the murderer shake hands with Lee inside the club just before she and Lee had left. The video from inside the club showed Soza shaking hands with Lee shortly before both men left the club.

¶6 Although the evidence was far from overwhelming, it is not for us to “decide whether we would reach the same conclusion as the jury.” *State v. Collins*, 104 Ariz. 449, 450, 454 P.2d 991, 992 (1969). “The question is whether, on the evidence presented, rational factfinders could find guilt beyond a reasonable doubt.” *State v. Fulminante*, 193 Ariz. 485, ¶ 24, 975 P.2d 75, 83 (1999); *see also Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477. There was sufficient evidence for the jury to find, beyond a reasonable doubt, that Soza had been the gunman. “While each element of the offense must be established beyond a reasonable doubt, each supporting fact need not be. Taken as a whole, the admissible evidence was thin but sufficient to support a verdict that [Soza] was the killer.” *Fulminante*, 193 Ariz. at ¶ 28, 975 P.2d at 84 (internal citation omitted). Thus, the trial court did not abuse its discretion in denying Soza’s motion for a judgment of acquittal.

Evidence of prior incarceration

¶7 Soza next argues the trial court should have granted his motion to preclude evidence of his prior incarceration. We review a trial court’s ruling on the admissibility of

a group photograph police had obtained from a “MySpace” web site page. Although Matthew was able to identify Soza in this photograph, he had told an officer at the scene that he was not sure if he could identify the shooter by face. And, he testified that in identifying Soza, he had relied on the fact that the shooter had tattoos on his arms and Soza was the only person in the “MySpace” photograph with visible tattoos.

evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004). Rule 403, Ariz. R. Evid., provides that evidence is inadmissible if its probative value is substantially outweighed by its prejudicial effect. *State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1071, 1076 (1988).

¶8 At trial, the state sought to establish that Soza had a motive for committing the murder because Lee had testified against Maldonado, a fellow Barrio Centro gang member, and was therefore a “snitch.” Thus, the state argued that Soza’s Department of Corrections “pen pack” was probative evidence of “motive” and “timing”: “[Soza] had the opportunity while in prison to have communications with Raul Maldonado. He’s been out of prison for two months, and within two months, the snitch is dead.” However, Soza objected that the introduction of his prison record was “wildly prejudicial.” He argued any tendency of the evidence to show that because Maldonado had been “in prison somewhere” he and Maldonado could have communicated was “tiny,” given the “tens of thousands of people in our prison system” and the fact that there was no evidence the two men had actually communicated.⁴

⁴On appeal, Soza also argues the prison record represented impermissible “other act” evidence pursuant to Rule 404(b), Ariz. R. Evid. But because Soza did not object to the evidence on this ground at trial, he waived this argument, and we need not consider it. *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993) (objection on one ground does not preserve issues on other grounds). In any event, we find it should have been excluded under Rule 403.

¶9 The trial court apparently agreed with the state, finding “the probative value of that evidence outweighs the prejudicial effect.” We disagree. In the context of the evidence the state actually presented, it is difficult to assign any probative value to the fact of Soza’s prior incarceration. In particular, although the state sought to have its Department of Corrections witness testify from memory that he had observed a computer record suggesting that Soza and Maldonado had been housed six cells away from each other for three months before Soza was released, the court precluded such testimony on hearsay, reliability, and disclosure grounds. Had the state introduced such evidence in an admissible form, the probative value of Soza’s prison record would have been significantly greater. However, we cannot uphold its admission on such speculative grounds, particularly when, as a result of the state’s failure to produce admissible evidence, the jury heard no evidence that the two men had been housed in the same prison, let alone the same cell block. Nor did the state present any evidence that Soza knew Maldonado; that he knew Lee had testified against Maldonado; or that Maldonado was actually a member of the Barrio Centro gang.⁵

⁵We also note that evidence of contact between Soza and Maldonado would have increased the likelihood that Soza knew Lee had been a cooperating witness for the state and thus the probative value of the derogatory poem about snitches also objected to by Soza. Although possession of

a book such as *The Great Train Robbery* would not necessarily be relevant and admissible in a run-of-the-mill theft case[] . . . if the crime charged happened to be theft of a money shipment from a train, then possession of the book might possibly be

¶10 Moreover, because of the danger of undue prejudice, the general rule is that “evidence of the commission by [an] accused of other offenses entirely distinct and independent of that for which he is on trial is . . . [not] admissible.” *State v. Thomas*, 71 Ariz. 423, 425, 229 P.2d 246, 247 (1951). And this rule extends to “any evidence showing [a defendant] ha[s] spent time in prison.” *State v. Bailey*, 160 Ariz. 277, 280, 772 P.2d 1130, 1133 (1989). Therefore, “[e]ven recognizing [a trial] court’s discretion, [a] decision to admit evidence that suggests prior criminal acts without any real probative value constitutes error.” *United States v. Neill*, 166 F.3d 943, 946 (9th Cir. 1999) (finding error in court’s admission of testimony concerning defendant’s work release status). Here, the evidence identifying Soza as a recently released criminal had no probative value, other than as impermissible evidence of his bad character. *See State v. Ives*, 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996). We thus find the court erred in admitting it.

Harmless error determination

¶11 Having concluded the evidence of Soza’s prior incarceration was inadmissible under Rule 403, we must determine whether the error was harmless. *See Fulminante*, 193 Ariz. 485, ¶ 49, 975 P.2d at 90; *State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607

relevant[,] depending upon the precise facts and circumstances of the case.

United States v. Curtin, 489 F.3d 935, 956 (9th Cir. 2007). But, because we cannot predict how the “facts and circumstances” of this case will be presented on retrial, and we find the erroneous admission of Soza’s prison record dispositive, we do not reach this issue.

(2005). “[E]rroneously admitted evidence is harmless in a criminal case only when the reviewing court is satisfied beyond a reasonable doubt that the error did not impact the verdict.” *State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805 (2000). However, we “cannot and do[] not determine an error is harmless merely because the record contains sufficient untainted evidence.” *State v. Wood*, 180 Ariz. 53, 64, 881 P.2d 1158, 1169 (1994). “Obviously, erroneously admitted evidence may be prejudicial even if the other evidence is sufficient to support a verdict.” *Fulminante*, 193 Ariz. 485, ¶ 13, 975 P.2d at 81. Rather, we consider whether “the tainted evidence supports a fact otherwise established by existing evidence,” *Bass*, 198 Ariz. 571, ¶ 40, 12 P.3d at 806, and “the likely effect on the jury of the improperly admitted [evidence],” *Fulminante*, 193 Ariz. 485, ¶ 50, 975 P.2d at 90.

¶12 In *Wood*, our supreme court found the erroneous admission of evidence was nevertheless harmless because properly admitted evidence was sufficient to support the conviction and because the state had neither emphasized the challenged evidence nor asked the witness to elaborate on it. 180 Ariz. at 64, 881 P.2d at 1169. In *Fulminante*, however, the court noted that where evidence was admitted erroneously and without a limiting instruction, it had to assume the jury could have considered the evidence for an improper purpose. 193 Ariz. 485, ¶ 50, 975 P.2d at 90. The court found that the challenged evidence, so considered, strongly supported the state’s theory of the defendant’s motive in

what was otherwise a “thin case,” and it therefore could not conclude beyond a reasonable doubt that the evidence had not affected the verdict. *Id.* ¶ 54.

¶13 Here, the admission of the evidence establishing Soza’s prior criminal history and incarceration was both improper and the state emphasized the evidence to support its theory of Soza’s motive for the murder. The prosecutor asked the Department of Corrections witness to elaborate after establishing a foundation for the admission of the record. Specifically, the prosecutor elicited testimony regarding Soza’s inmate number, the date of his release, and asked for confirmation that prior to that date Soza had “been incarcerated in the Department of Corrections.” And, because the evidence was admitted without any limiting instruction, “we must assume” the jury could have considered the fact of Soza’s prior incarceration as evidence of his bad character or criminal propensity. *See id.* ¶ 50. Given that this, too, was a “thin case,” we cannot conclude beyond a reasonable doubt that this evidence did not affect the verdict. *See id.* ¶ 54. We thus reverse and remand to the trial court for a retrial. *See Korzep v. Superior Court*, 172 Ariz. 534, 541, 838 P.2d 1295, 1302 (App. 1991) (“When a case is reversed for trial error, the state is not foreclosed from a retrial or from presenting evidence at a new trial in response to that error.”).

Pretrial identification

¶14 Soza also argues the court erred when it denied his motion to preclude evidence of his pretrial identification by Matthew in a photograph police had obtained from

a “MySpace” web site page. We address this issue because it is likely to recur on remand.⁶ See *State v. May*, 210 Ariz. 452, ¶ 1, 112 P.3d 39, 40 (App. 2005).

¶15 Citing *Neil v. Biggers*, 409 U.S. 188 (1972), Soza argues the identification was “derived from suggestive and prejudicial identification procedures” and thus should not have been admitted. However, Soza’s reliance on *Biggers* is misplaced.⁷ Except where the state seeks to use an unduly suggestive procedure as foundation for an in-court identification of a defendant, see *State v. Dessureault*, 104 Ariz. 380, 383-84, 453 P.2d 951, 954-55 (1969), “[a]ny complaints concerning [an] identification go to its weight and credibility, not its admissibility. Such matters are of course for the jury to consider,” *State v. Prion*, 203 Ariz. 157, ¶ 18, 52 P.3d 189, 193 (2002). See also *State v. Canez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002). And here, as Soza concedes, there was no in-court identification.⁸ Furthermore, in this case, as in *Prion*, the jury was presented with extensive psychological

⁶Conversely, because it is unlikely to recur on remand, we do not address Soza’s argument that the court erred in failing to consider mitigating factors at sentencing, apparently based solely on Soza’s interpretation of the court’s statement, “In mitigation, I have considered the defendant’s childhood,” as implying the court had not considered—and rejected—other potentially mitigating factors.

⁷To the extent Soza suggests, pursuant to *Biggers*, that his due process rights were violated by the admission of the identification, he utterly fails to present any facts to make the necessary showing that, “under the ‘totality of the circumstances’ the identification was [un]reliable.” 409 U.S. at 199; see *State v. Canez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002) (listing *Biggers* factors). We therefore do not consider this argument.

⁸For this reason, there is no merit to Soza’s argument that the court erred in failing to give a *Dessureault* jury instruction. See *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955 (articulating instruction that jury “be satisfied beyond a reasonable doubt that *the in-court identification* was independent of the previous pretrial identification”) (emphasis added).

testimony challenging the reliability of the identification, 208 Ariz. 157, ¶ 17, 52 P.3d at 189, and evidence that the witness had been unable to identify Soza from a less suggestive photographic line-up. Thus, Soza received a fair opportunity to challenge the identification before the jury. The trial court therefore did not abuse its discretion in admitting evidence of the pretrial identification.

Disposition

¶16 For the reasons stated above, we reverse and remand for a new trial.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge